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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-1871

MAURICE W. STEVENSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable Chief Justice and Associate Justices of The United States Supreme Court:

Petitioner, Maurice W. Stevenson, respectfully prays that the Court issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit affirming that he is guilty of a violation of a federal criminal statute relating to narcotic drugs as he has been adjudged to be guilty by the United States District Court for the Northern District of Illinois, Eastern Division.

REFERENCE TO OPINION BELOW.

The opinion of the Court of Appeals is appended hereto. The opinion has not yet been reported.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked pursuant to Rule 19-1 (b) of the rules of this Court on the ground that the Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of this Court and those of other Courts of Appeals on the same matter, has decided a federal question in a way in conflict with applicable decisions of this Court, and has sanctioned such a departure by a District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The judgment of the Court of Appeals affirming Petitioner's conviction in the District Court was made and entered on June 17, 1971.

A petition for rehearing was filed on June 25, 1971, and it was denied on July 8, 1971.

The Statutory Provision conferring jurisdiction on the Court to review the judgment in question by Writ of Certiorari is the Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

I.

Whether a Defendant is denied his Fifth Amendment right to due process and his Sixth Amendment right to have compulsory process for obtaining witnesses in his favor, when he calls a Government informer as his witness and the informer invokes the Fifth Amendment privilege against self-incrimination, and the Court refuses to allow the informer to testify as the Court's witness, and the Court allows the government to reopen its case-in-chief, allows the Government to call the informer as a witness for the Government and grants the informer immunity, and admonishes the informer at the Government's request that he has been granted immunity from everything but perjury, thus inducing the informer to testify in accord with a prior statement that he had given to government agents and contrary to a prior statement he had made to defense counsel; and whether such conduct of the Government and the Court constitutes an unlawful suppression of evidence favorable to the Defendant.

II.

Whether the trial court acted in derogation of Defendant's constitutional right of trial by jury when he commented upon a disputed fact, and whether he committed reversible error by making such a comment.

III.

Whether the trial court committed reversible error by commenting on the weight of the evidence.

IV.

Whether the trial court committed reversible error by allowing improper and prejudicial attempted impeachment of Defendant by the District Attorney, and by making prejudicial comments in the presence of the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

United States Constitution, Amendment V:

". . . nor shall any person . . . be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury . . . and . . . to have compulsory process for obtaining witnesses in his favor. . . ."

Title 21, Section 174, United States Code (Title 21, U.S.C.A., Sec. 174):

"Whoever fraudulently or knowingly imports or brings any narcotic drugs into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . ."

Title 26, Section 4705(a), United States Code (Title 26, U.S.C.A., Sec. 4705(a)):

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the secretary or his delegate."

STATEMENT OF THE CASE.

Petitioner, Maurice W. Stevenson, was charged in a three-count indictment with having unlawfully sold, received and otherwise dealt with narcotic drugs on November 30, 1966 and August 18, 1967, in violation of 26 U.S.C. Sec. 4705(a) and 21 U.S.C. Sec. 174. Following a conviction, the Court of Appeals reversed the judgment[1] and remanded the cause to the District Court for a new trial.

Petitioner was re-tried on counts one[2] and two[3] which dealt only with the transaction of November 30, 1966. Upon a trial before a jury Petitioner was found guilty as charged in counts one and two of the indictment, and was sentenced to a term of imprisonment upon each of said counts for a period of five years, the sentences to run concurrently.

On November 30, 1666, a federal narcotics agent, Kenneth C. Cloud, and an informer, Howard Elkins, drove to 46th Street and St. Lawrence Avenue in Chicago. At this location, the informer introduced Cloud to a man identified as Petitioner. After an alleged conversation, Cloud paid the man $115.00 for a spoon of heroin which was to be delivered at 40th and State Streets.

Cloud and the informer proceeded to that location. At about 6:00 p.m., the man to whom the money had been

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[1] *United States* v. *Stevenson,* 409 F. 2d 354.
[2] Title 26 U.S.C. Sec. 4705(a).
[3] Title 21 U.S.C. Sec. 174.

paid arrived in a red Buick convertible. He walked to Cloud's car, leaned down and dropped three tin foil packages into the informer's hands and then walked away, according to the testimony of agents.

During the course of the trial, Petitioner called the Government informer as a witness for the defense. (R. 399). The informer refused to testify, invoking his constitutional privilege against self-incrimination (R. 399-402) after having been so advised by his privately retained counsel (R. 415-421). After a long argument between the Court and counsel, the Government agreed to grant immunity to the informer only if the Court would allow the Government to reopen its case-in-chief and call the informer as the Government's witness, which was done over the Petitioner's objection (R. 450-452). The trial court explained to the informer the duty to tell the truth and that the grant of immunity did not exclude a prosecution for perjury (R. 483). Also, the Government attorney threatened the informer with possible prosecution for perjury (R. 476).

The Petitioner testified in his own behalf. During the cross examination of Petitioner, the District Attorney questioned him about the place of his employment in 1966, about whether he was employed in 1966, about the place where he had purchased his new, expensive model Buick automobile, about his employment in May, 1967 when he paid $500.00 for the repair of his automobile, about his arrest eight months after November 30, 1966, about whether he lived in Chicago from November 30, 1966 until his arrest, and about the number of his residences (R. 576-592). The trial judge sustained objections and

granted Petitioner's motions to strike some of the questions (R. 576-580).

At the close of all the evidence, the Government offered a packet, Government Exhibit 3 C 1, into evidence which was received over Defendant's objection (R. 348-352). A few moments before the jury retired for deliberation, the trial court said in their presence, "I am not going to send heroin (Government Exhibit 3 C 1) to the jury room. I am sorry, Mr. Savage!" Defense counsel moved the court for a mistrial, which motion was denied (R. 724).

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT.

I.

PETITIONER HAS BEEN DENIED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR WHERE HE CALLED A GOVERNMENT INFORMER AS HIS WITNESS AND THE INFORMER INVOKED THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, AND THE COURT ALLOWED THE GOVERNMENT TO REOPEN ITS CASE-IN-CHIEF, AND TO GRANT IMMUNITY TO THE INFORMER ON THE CONDITION THAT THE INFORMER TESTIFY AS A GOVERNMENT WITNESS, AND ADMONISHED THE INFORMER AT THE GOVERNMENT'S REQUEST THAT HE HAD BEEN GRANTED IMMUNITY FROM EVERYTHING BUT PERJURY — WHICH INDUCED THE INFORMER TO TESTIFY IN ACCORD WITH A PRIOR STATEMENT THAT HE HAD GIVEN TO GOVERNMENT AGENTS AND CONTRARY TO A PRIOR STATEMENT HE HAD MADE TO DEFENSE COUNSEL, ALL TOGETHER CONSTITUTING AN EFFECTIVE SUPPRESSION OF EVIDENCE FAVORABLE TO PETITIONER.

Howard Elkins, a/k/a Howard Pearce, a Government informer who allegedly participated in the alleged sale of narcotics, was not called as a witness by the Government in its case-in-chief. The Petitioner called the informer as his witness, and the informer invoked his Fifth Amendment privilege against self-incrimination on the advice of his privately retained counsel.

After a lengthy proceeding out of the presence of the jury, defense counsel sought to have Elkins (the in-

former) called as the Court's witness. To support defense counsel's theory of calling the informer as a court witness, he made an offer of proof that the informer would testify that a few weeks prior to the trial of the case at bar, he (defense counsel) met the Government informer, Elkins, at his residence and discussed the case with him. As a result of this meeting and conversation, defense counsel had reasonable ground to expect that Elkins would testify that he (the informer) was a Government employee and an informer in November, 1966, that he was paid for such activity, that he did not know of a transaction with the defendant on November 30, 1966, that he was never in the company of Agent Cloud and the Petitioner, Maurice W. Stevenson, on that date, and that he did not receive any drugs or package of any kind from the Petitioner on that date (R. 403).

Upon this offer of proof, the trial court was shocked that the Government would not grant immunity to the informer so that he might testify for Petitioner, and he indicated that he would compel the witness to testify (R. 424-425). The Government changed its position and agreed to grant the informer immunity but only if the Government would be allowed to reopen its case-in-chief and call the informer as its own witness (R. 450).

Over defense counsel's objection, the Court allowed the Government to reopen its case-in-chief and call the informer as its witness.

The prosecutor, after the trial court had explained to the witness his duty to tell the truth, threatened this witness with a possible prosecution for perjury (R. 476). Also, a few days prior to trial, the informer was shown a prior statement which he had allegedly made about the

case, through the informer's attorney who had received this statement from the government agent (R. 456).

The determination of whether a witness should be called as an adverse witness is left to the sound discretion of the trial court. *Nevelle* v. *United States*, 272 F. 2d 414 (5th Cir.); *Holmes* v. *United States*, 11 F. 2d 569 (D.C. Cir.) In the case at bar the Court refused to call the informer as the Court's witness and this was an abuse of discretion and is reversible error. *Clingan* v. *United States*, 400 F. 2d 849 (5th Cir.).

The behavior of the prosecutor, the arbitrary and capricious misuse of the immunity statute, the prior charges against witness Elkins, and the threat of a possible prosecution for perjury was unfair and resulted in the suppression of favorable testimony for the defendant. While it is true that no one can know whether the informer would have testified favorably for Petitioner had the Government not been allowed to interfere with Petitioner's presentation of his case, no one can say he would not have. In *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, this Court held.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

It is the Petitioner's contention that the rule of *Brady* v. *Maryland* applies to the case at bar, and that the Petitioner's conviction should be reversed.

II-A.

THE TRIAL COURT HAS ACTED IN DEROGATION OF PETITIONER'S CONSTITUTIONAL RIGHT OF TRIAL BY JURY AND THE COURT OF APPEALS REFUSED TO OBEY THE MANDATE OF THIS COURT BY CONDONING AND EXCUSING THE ERROR OF THE TRIAL COURT.

After the trial court stated in the jury's presence that he would not send heroin to the jury room, (referring to a Government exhibit that the jury was called upon to determine the content of, if any) he apologized to defense counsel, but did not admonish the jury that he was merely expressing his opinion and that his opinion was not binding upon them. Petitioner moved for a mistrial because of the comment and the Court denied the motion (R. 722-724). There was no evidence that the packet contained heroin. The Court of Appeals, although setting out alternative reasons why the comment should not bring about a reversal, characterizes the comment as a fair comment on the evidence and proper to have been made by the trial judge.

In *Quercia* v. *United States,* 289 U.S. 466, 470, 472, 53 S. Ct. 698, 77 L. Ed. 1321 (1933), the defendant was convicted of a narcotics violation. While charging the jury the trial judge expressed his opinion that the defendant lied on the witness stand, but he added that this was merely his opinion and his opinion was not binding on the jury.

This Court held that this behavior was highly prejudicial and reversible error, notwithstanding the trial judge's statement that his opinion was not binding upon the jury, for "his definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utter-

ance, as to the basis of his opinion was not withdrawn." It should be noted that the conviction in *Quercia* was reversed because of the trial judge's statement of opinion was about the weight of the evidence and credibility of the testimony, not a statement that the defendant was guilty. Counsel urges that this case stands for the proposition that a trial judge, who comments about the weight of the evidence in the presence of the jury, embarks on a perilous undertaking and that a retraction to the effect that his opinion is not binding on the jury will be insufficient to avert a reversal. *United States* v. *Murdock*, 290 U.S. 389, 393-394, 54 S. Ct. 223, 78 L. Ed. 381 (1934).

In *United States* v. *Meltzer*, 100 F. 2d 739, 742, 749 (1938) (7th Cir.) the trial Judge commented at length on the weight of the evidence and credibility of the testimony in a criminal case. In reversing the defendant's conviction members of the Court expressed two views about the trial judge's commenting on evidence. Judge Evans predicated his decision to reverse on the failure of the trial judge to admonish the jury sufficiently that his opinion was not binding and could be freely disregarded, Judge Major and Judge Treanor concurred in the result, but expressed sincere regret that the established federal practice permitted a trial judge to comment to the jury about the facts and expressed their opinion that this practice abridges a defendant's Sixth Amendment right to be tried by an impartial jury. They set forth their understanding of *United States* v. *Murdock*, 290 U.S. 389 (1934) and *Quercia* v. *United States*, 289 U.S. 446 (1933) as follows:

> "So it is my conclusion that the Supreme Court has not approved the right of a trial judge in a jury case to express an opinion upon the ultimate issues

> to be decided by the jury, except in the particular situation wherein the facts are not in dispute, and in my opinion the rule should be thus limited."

Whenever this question has been discussed by this Court and by the various Courts of Appeals, it has been assumed that the trial judge's influence on the jury is necessarily and properly of great weight and his "lightest word or intimation is received with deference and may prove controlling." With such influence, such a comment by the trial judge will necessarily cause the jury to lose its impartiality. *United States* v. *Murdock, supra,* and *Quercia* v. *United States, supra.*

Where the right of the judge to comment on the evidence has been accepted, the trial judge has been required to qualify his remarks by reminding the jury that they are the sole judge of the merits of the case or of questions of fact and that they can freely disregard his opinion. It does not necessarily follow that such an admonition restores impartiality to the jury.

In *United States* v. *England,* 347 F. 2d 425, 433 (1965) (7th Cir.), the Court gave the historical foundation for the view that permits a trial judge to comment about the evidence. The Court in delineating that history noted the language of Sir Matthew Hale, in *History of the Common Law of England,* 2nd Ed., pp. 256-257:

> "Herein he (the judge) is able in matters of law emerging upon the evidence, to direct them (the jury); and also in matters of fact to give them a great light and assistance by this weighing the evidence before them and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact; which is a great advantage and light to laymen. And thus, as the jury

> assists the judge in determining the matters of fact, so the judge assists the jury, and also very much in investigating and enlightening the matter of fact, where the jury are judges."

Petitioner contends with proper respect that this view of Sir Hale is not appropriate today. Three or four hundred years ago, when jurors were illiterate and superstitious to the extent that they believed in demons, ghosts, and witches, a judicial great light and assistance in deciding questions of fact was clearly indicated. However, in this era when most jurors are fairly educated and well informed "Judicial great light and assistance" are unnecessary to their proper decision of the facts.

This Court reaffirmed the *Quercia* doctrine in *Bollenbach* v. *United States,* 326 U.S. 607, 90 L. Ed. 350 (1946) and held:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purposes of assuring its proper conduct and of determining questions of law. *Quercia* v. *United States,* 289 U.S. 466, 469, 77 L. ed. 1321, 1324, 53 S. Ct. 698. '*The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr* v. *United States,* 153 U.S. 614, 626, 38 L. ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

There is a conflict in the circuits with reference to the trial court's right to comment and his comments upon the evidence. Cf. *United States* v. *Marzano,* 149 F. 2d 926 (2d Cir. 1945); *Buchanan* v. *United States,* 244 F. 2d 916 (6th Cir. 1957); *Moody* v. *United States,* 377 F. 2d 175 (5th

Cir. 1967); *Bursten* v. *United States,* 396 F. 2d 976 (5th Cir. 1958); *United States* v. *Smith,* 399 F. 2d 896 (6th Cir. 1968); *Minner* v. *United States,* 57 F. 2d 506 (10th Cir.). This Court should exercise its supervisory power and grant certiorari and hold in accord with Justice Prettyman's decision in *Billici* v. *United States,* 184 F. 2d 394 at 402, 403:

> "A federal trial judge in a criminal case is not an inert figure. He is not a mere moderator. Besides his own exclusive functions of conducting the trial and declaring the applicable law, he may guide and assist the jury in its consideration of the evidence. The purpose of his comment is to aid, through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In exceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he can not be an advocate; he cannot urge his own view of the guilt or innocence of the accused."

Neither should the trial judge supply missing evidence by way of comment to the jury or foreclose the jury's function to determine what inferences to draw from the evidence before them, as did the trial judge in the case at bar with the subsequent approval of the Court of Appeals.

In recent years, this Court has acted in many instances and in different connections to secure to the criminal defendant his rights guaranteed by the Sixth Amendment. Petitioner respectfully urges that he attempts here merely to secure what is perhaps the most basic right under the Sixth Amendment, and that the invalidation of the right of a federal judge to comment to the jury on the facts, particularly his right to comment as the trial judge did in the case at bar, will significantly improve the administration of criminal justice in federal courts.

II-B.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY COMMENTING ON THE WEIGHT OF THE EVIDENCE.

In disposing of the question about the trial judge's comment about not sending heroin to the jury room, the Court of Appeals implied that the statement might not amount to a comment. Petitioner respectfully suggests and contends that this view is erroneous.

Although the Court of Appeals has determined that the trial judge sufficiently advised the jury that it was the "sole judge of the facts with complete discretion as to the evidence," the trial judge did not comply with the usual federal practice regarding comment on the facts before a jury. (See *United States* v. *England*, 347 F. 2d 427, 433-434 (7th Cir. 1965)). He uttered this comment *after* making his charge to the jury. Moreover, he did not express himself in a manner that would cause the jury to believe that they were charged with the responsibility of determining the contents of the packet. The trial judge did not admonish the jury that he was merely expressing his opinion which the jury could disregard.

In addition, the trial court could not possibly have known that the packet contained heroin for there was not a scintilla of evidence that it contained anything. His statement was pure conjecture.

Assuming that the trial judge can be regarded as having properly commented about the evidence, the comment still amounts to reversible error, for he did not advise the jury that the decision was theirs; and, if his prior charge can be deemed advance advice, it did not clearly advise them as to this subsequent comment.

In *McBride* v. *United States*, 314 F. 2d 75, 77-79 (1963) 10 Cir., the Court reversed a criminal conviction, and remanded the case for a new trial. During the charge to the jury, the trial judge told them several times that they were the sole judges of the facts, the weight of the evidence, and the credibility of the witnesses, and that he thought the defendant had acted intentionally, an integral part of the offense, but that:

> "Note what I have said to you is simply my views and you *must* disregard it. I have nothing to say except that I can make remarks as I have; but you must disregard what I have said about this case. You are the sole jurors in this case. You must pass on the evidence yourself, so I am asking you to disregard what I have said to you with reference to my views. Disregard it completely. Do not consider that I have said anything to you."

The reviewing Court stated that "the comments must instead be taken as a statement of the court that the accused was guilty, and this was not warranted under the circumstances." The Court found that the case was controlled by *Davis* v. *United States*, 227 F. 2d 568 (10th Cir. 1955), where the Court construed *United States* v.

Murdock, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381 (1934) to the effect that a trial judge can express his opinion about the guilt of a defendant only where the facts are undisputed and guilt is admitted as in *Honring* v. *District of Columbia,* 254 U.S. 135, 41 S. Ct. 53, 65 L. Ed. 185 (1920). In reaching this result, the Court stated:

> "In the instant case, the record shows that the facts bearing on the guilt of the appellant were in dispute and especially those relating to his intent and knowledge. The comments of the trial judge amount to an assertion that the appellant is clearly guilty. . . . The statements by the trial judge that the jury was the final trier of the facts did not serve to 'repair the damage done.'"

III.

THE IMPROPER AND PREJUDICIAL IMPEACHMENT OF PETITIONER BY THE DISTRICT ATTORNEY IN THE PRESENCE OF THE JURY CONSTITUTES REVERSIBLE ERROR, AND THE COURT OF APPEALS REFUSED TO OBSERVE THE MANDATE OF THIS COURT BY CONDONING AND EXCUSING THIS UNFAIR AND IMPROPER CONDUCT.

In *Berger* v. *United States,* 295 U.S. 78, 88-89 (1934), the prosecutor engaged in persistent and highly improper cross examination of witnesses by uttering improper suggestions, insinuations, and assertions of personal knowledge. In reversing the Defendant's criminal conviction, this Court observed that a prosecutor has a duty to act with earnestness and vigor, but must refrain from improper methods to achieve a wrongful conviction, and stated: "But, while he may strike hard blows, he is not at liberty to strike foul ones." Because the misconduct of the prosecutor was not slight or confined to a single instance, this Court held that Berger was entitled to a

new trial in that the probable cumulative effect of the misconduct on the jury could not be regarded as inconsequential.

In the case at bar, the Court of Appeals indicated that the questions of the District Attorney were "arguably improper", but disposed of the issue raised by stating that there was no prejudice to Petitioner because the trial court sustained defense counsel's objections to the improper questions and admonished the jury to disregard them. In reaching this result, the Court of Appeals cited *United States* v. *Lacob*, 416 F. 2d 756, 763 (7th Cir. 1969), cert. denied, 396 U.S. 1059 (1970); and *United States* v. *Spatuzza*, 331 F. 2d 217 (7th Cir. 1964), cert. denied, 379 U.S. 829.

Petitioner urges that the Court of Appeals has declined to follow the rule laid down by this Court in *United States* v. *Berger*, 295 U.S. 78, 88-89 (1934). There were four or five instances of misconduct by the District Attorney in the case at bar. The cases cited by the Court of Appeals concern only one act of misconduct by a prosecutor. The District Attorney should have known the bounds of a proper cross examination and attempted impeachment, and of his right to only one honest mistake.

In this case, the highly inflammatory, irrelevant, immaterial and prejudicial questioning of Petitioner by the District Attorney presented to the jury, together with some admissible evidence, the following conjecture: If Petitioner could acquire a 1967 Buick 225 Electra automobile prior to November 30, 1966 as he did, and if he could pay $500.00 for its repair without being gainfully employed, as he did, he probably obtained the necessary funds by selling heroin hydrochloride, as he had been

charged, or by the commission of some other illegal act. His frequent changes of residence were consistent with his alleged vocation or some other criminal activity.

It is an entirely fair inference that most members of the jury worked for a living or were married to those who worked for a living. Also, certain of these jurors could not afford a brand new Buick Electra 225, or would have found the acquisition and proper maintenance of such a vehicle a severe financial detriment. Such a picture of Petitioner, almost without question, would arouse the jury's feelings against him. Moreover, the nature of the offense of selling narcotics arouses extreme animosity, distaste, and loathing of most law abiding Americans, and these persons make up juries.

The deliberate employment of improper and prejudicial cross examination of Petitioner undoubtedly awakened animosity of the jury against him. For this reason, the tactics of the District Attorney should not be condoned, for, to do so rubs luster from the traditions of fairness in American Jurisprudence.

Respectfully submitted,

HOWARD T. SAVAGE,

Attorney for Petitioner.

APPENDIX

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1970 — JANUARY SESSION, 1971

No. 18440

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MAURICE W. STEVENSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 17, 1971

Before FAIRCHILD and PELL, *Circuit Judges*, and GORDON, *District Judge*.[1]

PELL, *Circuit Judge*. Defendant Maurice W. Stevenson was charged in a three count indictment with having unlawfully sold, received and otherwise dealt with narcotic drugs on November 30, 1966 and August 18, 1967 in violation of 26 U.S.C. §4705(a) and 21 U.S.C. §174. Following conviction this court reversed the judgments and remanded the cause for a new trial. *United States* v. *Stevenson*, 409 F.2d 354 (7th Cir. 1969).

Stevenson was retried on the first two counts of the indictment relating to occurrences on November 30, 1966, and was again found guilty following a jury trial. He was sentenced to five years imprisonment on each count,

[1] Judge Gordon is sitting by designation from the Eastern District of Wisconsin.

the sentences to run concurrently. Stevenson brings the instant appeal from those judgments of conviction and sentence.

The relevant facts are these. On November 30, 1966, Federal Bureau of Narcotics Agent Kenneth C. Cloud and an informer, Elkins, drove to 46th Street and St. Lawrence Avenue in Chicago, followed by agents Bottorff and Verdovec in a second car. There the informer introduced Cloud to a man later identified in testimony as Stevenson. After some conversation, Cloud paid the man $115 for a spoon of heroin which was to be delivered within 10 minutes at 40th and State Streets.

Cloud and the informer proceeded to that location. At about 6:00 p.m., the man to whom the money had been paid arrived in a red Buick convertible. He walked to Cloud's car, leaned down and dropped three tin foil packages into the informer's hands. Cloud immediately took the packages. The man walked away.

Stevenson contends that the evidence was not sufficient to prove him guilty beyond a reasonable doubt. He first urges that there is "a possibility of a break in the chain of custody" of the narcotics introduced in evidence against him. Stevenson concedes that on this question the trial judge is to determine the adequacy of the evidence of custody to warrant reception of physical evidence and that this decision can be overturned only for clear abuse of discretion. *See Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960). He also concedes that Government witnesses testified to the whereabouts of the evidence during the entire period from its acquisition until trial.

He contends, however, that due to the length of time between the alleged offense and his second trial, the number of people who had custody of the evidence, the fact that at one point the evidence was mailed to and from Washington, D.C., and the fact that Government witnesses refreshed their recollection from official records, it is "a bit more than conceivable that tampering with the evidence has occurred." Such utter speculation cannot be credited on appeal in the face of Government evidence showing a continuous chain of custody. As Stevenson further concedes, the mere fact that it is conceivable

that tampering has occurred is not sufficient to require the exclusion of the evidence. *West* v. *United States*, 359 F. 2d 50, 55 (8th Cir. 1966), *cert. denied* 385 U.S. 867. The trial court did not abuse its discretion in admitting the narcotics in evidence.

Defendant also points to certain minor discrepancies between the testimony of the Government agents and the informer. The discrepancies involve the exact location, within a block or two, of the meetings with Stevenson; the color of the top of Stevenson's car; whether the informer had any money with him and who walked to whom when the narcotics were passed.

The record contains uncontradicted testimony of the agents and the informer that Cloud and the informer did meet Stevenson twice on November 30, 1966, that on the first meeting money was transferred to him and that on the second meeting he transferred narcotics to Cloud and the informer. In light of this testimony, the assembled minor discrepancies cannot negate the fact that the jury was presented with sufficient evidence to find Stevenson guilty beyond a reasonable doubt.

Stevenson further challenges the ability of the Government agents to identify him because of the darkness at the time of the meetings. The agents testified that it was just getting dark. We, of course, must take the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), and given the face-to-face nature of the meetings, we cannot say that the jury could not find that Stevenson had been adequately identified as the person who sold the narcotics to agent Cloud.

Stevenson next urges that the trial court abused its discretion in permitting the Government to reopen its case-in-chief and that this had the effect of denying him due process by suppressing favorable evidence.

The defense had subpoenaed the informer Elkins. Based on a prior conversation with Elkins, defense counsel believed that Elkins would testify that he was a paid Government informer in November 1966; that he knew nothing of the transaction with Stevenson on November

30, 1966; that he was never with Stevenson or agent Cloud on that day and that he did not receive drugs or any other packages from Stevenson.

When the defense called Elkins, he invoked his Fifth Amendment privilege against self-incrimination on the advice of his own attorney. A lengthy proceeding out of the presence of the jury followed. The trial judge indicated his belief that there was no real basis for the assertion of the privilege and his displeasure at the Government's reluctance to grant Elkins immunity. Defense counsel indicated his desire that Elkins be called as a witness of the court.

After further discussion, the Government agreed to grant Elkins immunity if it was permitted to reopen its case for the purpose of making him its own witness. Defense counsel objected to this procedure for fear that the Government's sudden change of position in agreeing to grant immunity and call Elkins as its own witness indicated the possibility of tampering. The court questioned Elkins as to any contacts with the Government since the commencement of the case and established that there had been none. However, it also appeared that after Elkins had talked to defense counsel, he had seen a statement he had previously given to the Government.

Elkins was asked whether his testimony would be different than what he had told defense counsel it would be in their earlier meeting. He replied that it would be. Defense counsel continued to object to Elkins being called as a Government witness. The trial court asked if the defense would call him as its witness and defense counsel replied that he would not and again requested that Elkins be called as a court witness. The court pointed out that so long as the Government was willing to call him, there was no need to make Elkins a court witness. Defense counsel agreed that that was true.

The court then ruled that it would permit the Government to reopen its case for the purpose of calling Elkins and would permit the defense a wide scope of cross-examination. Elkins testimony covered the details of the November 30, 1966 transaction and corroborated the testimony of the Government agents in all material

respects. On cross-examination, defense counsel did not raise the subject of Elkins prior inconsistent statement to defense counsel.

Stevenson concedes that the trial judge has broad discretion with respect to the order of proof and permitting a party to reopen its case. *See Rhyne* v. *United States,* 407 F.2d 657, 661 (7th Cir. 1969). However, he contends that that discretion was abused here. He argues that by permitting the Government to reopen to put Elkins on the stand, rather than forcing Elkins to testify when called as a defense witness, the court aided the prosecutor in suppressing evidence favorable to the defense, for "if he had forced Elkins to testify, this witness would have given testimony highly favorable to defendant or would have been impeached under the doctrine of prior inconsistent statements." Stevenson urges that "cross-examination, although it may have broad latitude, must pertain to what is developed on direct examination."

We see no merit in this argument. It is clear that Elkins' testimony would not have been "highly favorable to defendant" since Elkins had informed the court and defense counsel that it would not be. As to the possibility of impeachment, we fail to understand why Elkins was any less impeachable by his prior inconsistent statement when testifying as a Government witness than he would have been had he testified as a defense witness. In fact, it is difficult to see how defense counsel could have hoped to impeach Elkins had he testified as a defense witness after informing defense counsel of what his testimony would be and thereby precluding any claim of surprise. *See Bushaw* v. *United States,* 353 F.2d 477, 481 (9th Cir. 1965), *cert. denied* 384 U.S. 921 (1966). On the other hand, his right to impeach him as a Government witness seems plain. *See United States* v. *Ruehrup,* 333 F.2d 641, 645-46 (7th Cir. 1964), *cert. denied* 379 U.S. 903. Furthermore, having failed to make any attempt to impeach Elkins at trial, Stevenson is in no position to assert that he would not have been permitted to do so had he tried. In fact, the trial judge specifically stated that such impeachment would have been "perfectly proper."

Thus, it would appear that the ruling permitting the Government to re-open its case-in-chief was actually

beneficial to Stevenson since it meant that he would not be bound by Elkins' testimony and could fully cross-examine and impeach him. This, of course, was just what defense counsel sought when he asked that Elkins be called as a court witness. Thus, we conclude that there has been no showing of prejudice and that the trial court did not abuse its discretion in permitting the Government to reopen its case for the purpose of making Elkins its own witness. Nor did this procedure result in the suppression of any evidence in violation of Stevenson's due process rights.

In this same connection, Stevenson contends that Elkins was somehow intimidated by the trial court and the prosecutor when he was warned that the grant of immunity did not extend to perjury. We find no such intimidation in the cautioning remarks of the court and prosecutor as revealed by the record before us. It is no more than that faced by every witness who testifies under oath. Every witness is confronted with the standing "threat" that he tell the truth or risk the possibility of a prosecution for perjury. *See United States* v. *Snyder,* 428 F.2d 520, 522 (9th Cir. 1970).

Stevenson further contends that the trial court committed reversible error in commenting upon the evidence, the weight of the evidence and the credibility of the witnesses. With one exception, these contentions do not merit extended discussion. Stevenson concedes that "upon reviewing the record, except for the final remark to the jury, it is quite obvious that the learned trial judge apparently conformed to the letter of neutrality." On the other hand, he contends, "it is equally obvious that his mode of presentation to the jury did not conform to the spirit of neutrality, for he expressed his opinion by innuendo."

Study of the transcript of the trial court's entire charge to the jury reveals no such "innuendo." The passages relied upon by Stevenson have simply been taken out of context. It is difficult to find the "innuendo" even when the statements are thus torn from their context. There certainly is none when they are read in context.

The one exception which merits specific mention is a statement made by the trial judge just as the jury was

retiring to consider its verdict. A question arose as to which of the physical exhibits should go to jury room. In the course of discussing various exhibits with counsel, the trial judge said: "I am not going to send heroin to the jury room. I am sorry."

First, we think it obvious that this offhand comment, made after the judge had concluded his charge to the jury and as he was excusing it, cannot be taken as an instruction that the jury should, as a matter of law, make a finding of fact adverse to defendant on an essential element of the crime. *Cf. United States* v. *England*, 347 F.2d 425 (7th Cir. 1965). At most, and even here we stretch the usual understanding, it amounts to a comment upon the evidence. The right of the trial judge to comment fairly upon the evidence is, of course, firmly established in the federal courts. *See England, supra,* 347 F.2d at 433-34. It is only essential that, in the end, "the decision of issues of fact must be fairly left to the jury. . . ." *United States* v. *Murdock,* 290 U.S. 389, 394 (1933).

There can be no question that here the trial judge was scrupulously careful throughout his charge to emphasize to the jury that the decision was theirs, not his, and that his only thought of what the decision should be was that it should be what they decided. Thus, even if the challenged side comment can be viewed as a comment on the evidence, we find that the judge specifically, repeatedly and sufficiently advised the jury that it had the obligation to be "the sole judges of the facts with complete discretion as to the evidence."

Further, we think the aside was a fair comment upon the evidence if, indeed, the jury took it as a comment. The Government produced an expert who testified that the white powder offered in evidence contained heroin hydrochloride. The accuracy of his analysis was not challenged on cross-examination. No defense expert was offered to contradict the Government test results. Thus, as the evidence went to the jury, the fact that the exhibit contained heroin was all but conceded. The major thrust of the defense offered was not that there had been no sale of a narcotic drug but that the identification of Stevenson as the seller was erroneous. Under all of the circumstances of the instant case, this court's holding in *United States*

v. *Jonikas*, 197 F.2d 675, 679 (7th Cir. 1952), *cert. denied* 344 U.S. 877, is applicable:

> "It is not even reversible error for the court in its instructions to assume the existence of facts, the existence of which is undisputed or proved beyond controversy." *But see England, supra*, 347 F.2d 427. *See also United States* v. *Melteer*, 100 F.2d 739 (7th Cir. 1938).

Stevenson also urges that the district court erred in admitting certain testimony by Government witnesses. Agent Cloud on direct testified that he occasionally performed in an undercover capacity and used advance funds, obtained from the cashier at the narcotics bureau, to make controlled purchases. He testified that he had been involved in two or three hundred cases.

Stevenson's basic objection to this testimony is that it is irrelevant as going only to the general procedures and is highly prejudicial since it directed the jury's attention to the whole serious problem of narcotics control. Neither of these assertions is persuasive. The testimony was relevant since these procedures were allegedly followed by agent Cloud in this case and his prior experience in such cases would aid the jury in assessing the credibility of his testimony. Further, Stevenson's allegations of prejudice are pure speculation which we find unpersuasive. Certainly, a jury sitting in a narcotics case could not be unaware of the general narcotics problem and we fail to see how such a jury would be "inflamed" by the description of the routine procedures of the narcotics bureau.

Stevenson also objects to the testimony of two other agents on redirect. In each instance, he contends the testimony went beyond the scope of cross-examination. In one case, the objection is that the redirect was more general than the cross; in the other, that the redirect was more specific than the cross. In our opinion, the defense's cross opened the subjects addressed on redirect and the redirect was within the scope of the cross. Stevenson attempts to draw unrealistically fine lines.

We find no error in the complained of evidentiary rulings of the trial court.

Finally, Stevenson complains of certain questions asked by the prosecutor in cross-examining him. The questions related to his employment, his car and his various places of residence. Timely objections were made to such questions and were sustained in most instances. Stevenson, however, contends that he was prejudiced because the questions could have induced the jury to believe that although he was unemployed, he owned an expensive car and that he had had a number of different residences. He further asserts that the prejudice was compounded by the trial court's lengthy admonitions to the jury in sustaining the objections. He stresses that this questioning was greatly protracted, that its effects could not therefore be cured by the sustaining of objections to the improper questioning and that the trial court should have required the prosecutor to abandon the whole line of questioning.

First, we note that the allegedly improper line of questioning was not nearly so protracted as Stevenson asserts. He contends that it occupied 47 pages of the record. However, Stevenson's entire testimony occupied only 31 pages and the cross-examination covers only 22 pages. The vast majority of these pages is taken up with unarguably proper cross-examination.

Next, we note that as to any questions relating to the type of car owned by Stevenson, the first thing that his own attorney had established on direct was that he owned the Buick Electra convertible about which the prosecutor later questioned him on cross. Thus, no allegedly improper innuendo from the prosecutor's question was needed to get that point across to the jury.

As to Stevenson's employment and residence, the trial court promptly squelched improper questions directed to those subjects. In each instance, the trial judge specifically instructed the jury, once at defense counsel's request, as to the impropriety of the question. Later in his charge to the jury, the trial judge cautioned the jury against giving consideration to questions to which objections had been made and sustained.

From our examination of the record, we can find no prejudice to Stevenson's cause by the asking of a minimal number of arguably improper questions, objections to

which were promptly sustained with careful and thorough admonitions to the jury to disregard the questions. *See United States* v. *Lacob*, 416 F.2d 756, 763 (7th Cir. 1969), *cert. denied* 396 U.S. 1059 (1970); and *United States* v. *Spatuzza*, 331 F.2d 214 (7th Cir. 1964), *cert. denied* 379 U.S. 829.

Having found Stevenson's various allegations of error to be without merit, the judgment of conviction and sentence is affirmed.

AFFIRMED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.